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# Trusts

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ing that it possessed a valid city license to operate cabs bearing such a designation, without the further showing that this descriptive phraseology had acquired a secondary meaning which entitled it to injunctive relief.

MAURICE S. CULP

## TRUSTS

### *Reservation of Income for Life, Plus Power to Alter, Amend or Revoke: Trust Not Testamentary*

In three cases courts of appeals held that an otherwise effective inter vivos trust is not rendered testamentary, and therefore invalid unless executed in conformity with the Wills Act, by the fact that the settlor reserved the net income for life, plus the power to modify and/or revoke the trust.<sup>1</sup> One of these cases, *First Nat'l Bank v. Tenney*,<sup>2</sup> was appealed to the Ohio Supreme Court. The appeal, however, was upon another ground,<sup>3</sup> the appellants at this stage having conceded the validity of the trust. The following comment by the court makes it clear that the concession was wisely made:

This concession is a recognition that the much criticized rule of *Worthington v. Redkey*,<sup>4</sup> has been properly, albeit not too peacefully, laid to rest in Ohio. Although it is unfortunate that, in bringing the law of Ohio into line with that of all the other states, reliance was placed on the supposed effect of an amendment to the statute of frauds rather than upon the sounder reasoning of *Stone v. Hackett*,<sup>5</sup> the interment is nonetheless complete.<sup>6</sup>

### *Court Will Not Remove Member of Stock Voting Committee Unless Interests Conflict*

In *Whiting v. Bryant*,<sup>7</sup> an action was brought to remove the defendant, Bryant, from a committee whose sole duty was the voting of stock of the

<sup>1</sup> *Krueger v. Central Trust Co.*, 136 N.E. 2d 121 (Ohio App. 1956); *Magoon v. Cleveland Trust Co.*, 134 N.E. 2d 879 (Ohio App. 1956); *First Nat'l Bank v. Tenney*, 137 N.E. 2d 585 (Ohio App. 1955).

<sup>2</sup> 165 Ohio St. 513, 138 N.E.2d 15 (1956). This decision is fully discussed at 8 WEST. RES. L. REV. 222 (1957).

<sup>3</sup> The issue on appeal is discussed in the section of this Survey on FUTURE INTERESTS, *supra*.

<sup>4</sup> 86 Ohio St. 128, 99 N.E. 211 (1912). An inter vivos trust in which settlor retained only the power of revocation was held invalid.

<sup>5</sup> 78 Mass. 227 (1858).

<sup>6</sup> *First Nat'l Bank v. Tenney*, 165 Ohio St. 513, 138 N.E.2d 15, 17 (1956)

<sup>7</sup> 131 N.E.2d 425 (Ohio App. 1956).

Austin Company, which stock was held by the corporate defendant-trustee under two inter vivos trusts. The committee was composed of the defendant, Bryant, and Whiting, who was one of the plaintiffs. Pursuant to the terms of the trusts, in event the two committeemen could not agree, the corporate trustee, in conjunction with either of the committeemen, could resolve how the stock was to be voted.

The plaintiffs claimed that there was a conflict of interests preventing Bryant from acting without prejudice to the trusts as a member of the voting committee, because he was also president of the Austin Company. It was stressed that as president he must act in the best interests of the company, and that in voting the stock of the trusts, he should serve the best interests of the trust — whereby the conflict arises. Further, it was claimed that acts of the defendant in attempting to purchase, or in suggesting that it would be to the best interests of the Austin Company to purchase the trust-held stock for use in further developing the incentive plan of the Company, is evidence of a conflict of interests or divided loyalty.

The court held that there was no conflict by virtue of the fact that defendant, Bryant, was president of the Company and a member of the voting committee. Rather, the interest of one was the same as the other — to see to it that the company was well managed. As for the defendant's suggestion that the Company should purchase such stock, the court noted that this bore no relationship to his duties as a member of the voting committee since only the corporate trustee could sell the stock held in the trusts. Also, there was no evidence of bad faith on the part of the defendant.

The court recognized that the removal of a trustee is a drastic action which should only be taken when the estate is actually endangered and intervention is necessary to save trust property. In the case at hand, it was therefore concluded that the power of the defendant over the trust property was so far removed from the possibility of doing harm to the trust property that it would be an abuse of discretion to enter a decree for his removal.

### *Charitable Trust: United States Government as Trustee*

*Edgeter v. Kemper*<sup>8</sup> involved the construction of a will giving the remainder of testator's property to the United States for a permanent fund, the interest of the fund to be used "for the relief of the various tribes of indigent American Indians." The court held that the will created a valid charitable trust and that: (1) the administration of such a trust is within the authorized powers of the federal government and the gov-

<sup>8</sup> 136 N.E.2d 630 (Ohio Prob. 1955)

ernment has a right to act as trustee; (2) the principle that the United States when acting as a trustee cannot be sued without its consent is merely an impediment to enforcement of the cestui's rights, but is no bar to the creation of a trust; and (3) the United States, as trustee, need not receive letters of appointment from a state probate court, since the probate court has jurisdiction only over persons, associations or corporations accountable to the probate court, and the federal government is not within the terms of the statute.<sup>9</sup> In every respect — but particularly in thoroughness and clarity — Judge Love's opinion is one of the finest this writer has ever read!

### *Charitable Trust: Attorney General Not Necessary Party in Will Contest*

In *Spang v. Cleveland Trust Co.*,<sup>10</sup> it was held that the attorney general is not a necessary party in a will contest, within Ohio Revised Code section 109.25 which, *inter alia*, provides: "The attorney general shall be a necessary party in all proceedings the object of which is: (1) To terminate a charitable trust or to distribute its assets to other than charitable donees ,," since the "object" of a will contest is to determine if the document is the last will of the decedent, and not, primarily, to terminate the trust.

### *Constructive Trust: Jurisdiction of Common Pleas Court To Impose Trust When Will Fraudulently Procured*

In *Jacobsen v. Jacobsen*<sup>11</sup> the Ohio Supreme Court held that where it is claimed that a purported beneficiary, under an instrument in the form of a will, secured its execution by forgery; fraudulently procured waivers of the next of kin of the purported testator for the purpose of probating such will; procured the probate of it by false testimony of the witnesses thereto; and had himself appointed executor thereof, the next of kin of the decedent may maintain a suit in the common pleas court to have the so-called beneficiary and executor held to be a trustee *ex maleficio* for the benefit of the next of kin who would have inherited the estate in the event of intestacy. The court stated that while the probate court is given exclusive jurisdiction as to all matters pertaining directly to the settlement of estates under Ohio Revised Code section 2101.24,

<sup>9</sup> OHIO REV. CODE § 2109.01.

<sup>10</sup> 134 N.E.2d 586 (Ohio C.P. 1956).

<sup>11</sup> 164 Ohio St. 413, 131 N.E.2d 833 (1956).

this does not mean the probate court has exclusive jurisdiction over a cause of action growing out of fraudulent acts committed against a testator, even though such person may thereafter become the executor of the estate.

The decision is believed to be sound. To hold otherwise would seem an unwarranted extension of the probate court's jurisdiction and an impractical limitation of that of the court of common pleas.

### *Reserved Power to Modify During Lifetime: Attempted Modification by Will Ineffective*

In *Magoon v. Cleveland Trust Co.*,<sup>12</sup> the settlor created an inter vivos trust; provided for payment to himself of the entire net income from the trust for his lifetime, plus the payment of parts of the principal in stated amounts at various intervals; and reserved the following rights and powers in the following fashion:

No power is reserved to me to revoke the settlement hereby evidenced, either in whole or in part, except that I retain the power to alter or amend the disposition to be made of the trust estate after my decease, and I hereby provide that any other revocation or amendment of this instrument shall be only with the consent and approval of the Probate Judge of Cuyahoga County, Ohio, any such revocation or modification to be evidenced by written instrument signed by me, and delivered to the trustee. To whatever extent this settlement shall be so revoked, the trustee shall thereupon transfer and deliver to me such part or all of the property comprising the trust estate as may have been withdrawn under such revocation, conditioned, however, upon my repaying any advances made by the trustee, and satisfactorily indemnifying it against any liabilities incurred by it in the execution of this trust.<sup>13</sup>

The settlor made one modification during his lifetime. When he died, his duly probated will contained a clause seemingly effecting another modification of the trust. The issue was whether the settlor had reserved the power in the trust agreement to make a modification by will. The court found that he had reserved the right to modify the trust only during his lifetime upon written notice to the trustee, and that the terms of the agreement did not authorize a modification by will. After reading the reservation of powers in the manner set forth above, the writer can only ask: Anyone for a course in legal drafting?

ROBERT C. BENSING

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<sup>12</sup> 134 N.E. 2d 879 (Ohio App. 1956).

<sup>13</sup> *Id.* at 880.